No. 91-5771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HAROLD RAY WADE, JR.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, absent a relevant provision in a plea agreement, a federal district court has any power to review a prosecutor's refusal to file a motion for reduction of sentence based on a defendant's substantial assistance?

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BRIEF FOR THE PETITIONER

For the reasons set forth below, petitioner requests that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit and remand this matter to the District Court for further consideration of the reasons behind the prosecutor's refusal to move for a downward departure.

OPINION BELOW

The opinion of the Court of Appeals is reported at 936 F.2d 169 (4th Cir. 1991) (J.A. 23-29). There is no District Court opinion, but the District Court's holding appears at J.A. 9-10.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on June 12, 1991 (J.A. 23). Petitioner filed his Petition for Writ of Certiorari on September 10, 1991

(J.A. 30). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND GUIDELINES INVOLVED

18 U.S.C. § 3553(e) provides:

> Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

28 U.S.C. § 994(n) provides:

> The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

United States Sentencing Commission Manual section 5K1.1 (Policy Statement) (Nov. 1990) provided:

> § 5K1.1 *Substantial Assistance to Authorities* (Policy Statement)
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include,

> but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

STATEMENT OF THE CASE

Petitioner was arrested by federal authorities for involvement in drug trafficking. Following his arrest, he began to cooperate with the authorities, anticipating that the government would accord him leniency in exchange (J.A. 24). Petitioner's assistance proved valuable to the government, resulting in the identification and conviction of several other individuals (J.A. 24).

Petitioner later pleaded guilty, without benefit of a plea agreement, to federal drug and firearms charges that together carried a statutorily-mandated minimum sentence of 15 years' imprisonment (J.A. 16). For reasons that were not explored by the trial court, and remain unknown at this time, the prosecutor did not choose to recognize petitioner's cooperation by moving for a downward departure pursuant to 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1.[1] At sentencing, petitioner's counsel ap-

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[1] The presentence report noted that prior to sentencing, petitioner wrote a letter urging another man falsely to claim owner-

prised the District Court of his cooperation and attempted to inquire of the prosecutor why he refused to make a substantial assistance motion (J.A. 8-9). The District Court refused to entertain this inquiry, holding that it lacked authority both to inquire into the reasons for the prosecutor's failure to make a substantial assistance motion and to consider petitioner's cooperation absent such a motion (J.A. 9-10). "Well, I believe I'm going to let you make some law with that case because I do not believe so, and I hold that I do not have that authority." (J.A. 9). The District Court then imposed the statutory minimum sentence on each count (J.A. 18).

The Court of Appeals affirmed (J.A. 23-29). As an initial matter, the Court of Appeals held that the District Court lacked authority under § 3553(e) to depart below the statutory minimum sentence in the absence of a motion from the government (J.A. 24-26). The Court of Appeals then held that although there was "no disagreement" that petitioner had in fact "provided valuable assistance to the government," the District Court had no power whatsoever to review the reasons for the prosecutor's refusal to make a substantial assistance motion, absent a plea agreement requiring the government to do so (J.A. 24, 26-28). The Court of Appeals reasoned that because § 3553(e) gives the prosecutor "sole discretion in deciding whether to file a motion for downward departure for substantial assistance," neither the defendant nor the

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ship of the firearms. Undoubtedly, the government will argue that this action alone constituted sufficient grounds for the prosecutor's refusal to file a substantial assistance motion, and that the District Court's refusal to inquire into the reasons for that decision was therefore harmless error, if error at all. This is a specious argument: the actual propriety of the prosecutor's refusal to move for departure is not before this Court. The only question properly before this Court is whether the District Court had the legal authority to inquire into the reasons for that refusal. The actual validity of those reasons is a question to be addressed in the first instance by the District Court on remand.

court may "inquire into the government's reasons and motives if the government does not make the motion." (J.A. 28). Permitting judicial review of that decision, the Court of Appeals concluded, "would result in undue intrusion by the courts into the prosecutorial discretion granted by the statute to the government." (J.A. 28).

SUMMARY OF ARGUMENT

18 U.S.C. § 3553(e) gives federal prosecutors the discretion to decide which defendants are entitled to have their cooperation with authorities considered as a possible basis for reduction of sentence below a statutory minimum. The Fourth Circuit has held that this provision strips the federal courts of all power to review the prosecutor's exercise of that discretion, even when presented with credible allegations of racial animus, intent to retaliate for exercise of protected rights, or some other blatantly unconstitutional conduct. In so doing, the Fourth Circuit places the conduct of prosecutors in a critical aspect of federal criminal proceedings effectively beyond the reach of the Constitution. The ruling is unprecedented: no other determination in all of the federal criminal justice system is similarly immune from judicial scrutiny.

The Fourth Circuit's ruling ignores a long line of decisions from this Court, which unequivocally establish that even decisions committed to the sole discretion of the prosecutor—*e.g.*, the decisions whether to prosecute and how to charge—remain subject to the limited judicial review necessary to ensure that the prosecutor is not exercising his discretion in an unconstitutional manner. *See, e.g., Wayte v. United States*, 470 U.S. 598 (1979) (reviewing prosecutor's charging decisions for alleged equal protection and first amendment violations). The prosecutor's substantial assistance decisions should be subject to judicial review under the same limited standards.

The Fourth Circuit's holding reflects a disturbingly narrow view of the federal courts' inherent power to supervise proceedings before them. As this Court has long recognized, that power necessarily extends to policing the conduct of prosecutors in federal criminal proceedings. *E.g., United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Hale*, 422 U.S. 171, 180 & n.7 (1975). The Fourth Circuit holds here, however, that a federal court has absolutely no power to review a prosecutor's refusal to make a substantial assistance motion, even when presented with credible allegations that the prosecutor acted with unconstitutional or otherwise illegal motives. This holding threatens not only the rights of criminal defendants, but also the integrity of federal criminal proceedings themselves. This Court should not tolerate such unprecedented abdication of the federal courts' inherent power—and corresponding duty—to uphold the Constitution and maintain the integrity of the federal judicial system.

Nothing in the statute itself supports the Fourth Circuit's total ban on judicial review of the prosecutor's substantial assistance decisions. Indeed, the statute is completely silent—and thus decidedly ambiguous—on the issue of judicial review. Ignoring basic principles of statutory construction, the Fourth Circuit resolves that ambiguity in a way that will undermine the statute's central purpose: the elimination of "'unwarranted sentencing disparities among defendants with similar records.'" *Mistretta v. United States*, 488 U.S. 361, 374 (1989) (quoting 28 U.S.C. § 991(b)(1)). The Fourth Circuit's interpretation of the statute also conflicts with the way this Court has interpreted congressional silence in analogous situations, *see Burns v. United States*, —— U.S. ——, 111 S.Ct. 2182 (1991), and violates the well-established rule that federal statutes must be construed, where "fairly possible," to "avoid serious doubt of their constitutionality." *International Association of Machinists v. Street*, 367 U.S. 740, 749-50 (1961).

Subjecting the prosecutor's substantial assistance decisions to the limited judicial review currently available for other matters committed to prosecutorial discretion will not unduly interfere with the prosecutor's exercise of his duties or impose an undue burden on the federal courts. To allow such review is not to say that a federal district court should lightly exercise its supervisory power to interfere with prosecutorial decisions. Here, as in review of the prosecutor's charging decisions, judicial inquiry must be guided and confined by a proper respect for the autonomy of a co-equal branch of government. *See Wayte*, 470 U.S. at 608. But such separation of powers concerns are reduced where, as here, the challenged prosecutorial decision is one made in the course of an ongoing judicial proceeding. In this context, the federal court's own interest in preserving the integrity of the proceedings before it requires that it retain some limited powers of review. The Constitution demands no less of Article III courts.

For the above reasons, the judgment below should be reversed and the case remanded for consideration of petitioner's allegations of prosecutorial misconduct.

ARGUMENT

The Sentencing Reform Act of 1984 (the Act), as amended, 18 U.S.C. §§ 3551 *et seq.* and 28 U.S.C. §§ 991-998, allows a defendant's cooperation with the authorities to be taken into account in sentencing in certain circumstances. 18 U.S.C. § 3553(e), the provision at issue in this case, provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." The Act also provides that the Sentencing Commission "shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 28 U.S.C. § 994(n).

To implement its statutory mandate, the Sentencing Commission has promulgated a Policy Statement governing all downward departures from guideline sentencing for substantial assistance. *See* U.S.S.G. § 5K1.1 (Policy Statement) (allowing the court to "depart from the guidelines" "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense"). The "upon motion of the government" language in § 3553(e) and § 5K1.1 is identical, and the lower courts have treated the two provisions as interchangeable for purposes of analyzing this requirement. *See, e.g., United States v. Hayes*, 939 F.2d 509, 511 (7th Cir. 1991), *cert. denied*, ——U.S. ——, —— S.Ct. ——, 1991 U.S.L.W. 23546 (Jan. 12, 1992) (No. 91-6364).

Because the charges brought in this case carried statutorily-mandated minimum sentences, the district court's power to depart downward for substantial assistance was governed *both* by § 3553(e), which specifically authorizes departures below a statutory minimum, and by the more general Policy Statement, which applies to all departures below the applicable guideline range. *See United States v. Keene*, 933 F.2d 711, 713-714 (9th Cir. 1991) (explaining overlap between § 3553(e) and § 5K1.1). The Court of Appeals recognized that the two provisions overlapped here, but treated the more specific statutory provision as controlling (J.A. 25) ("5K1.1 governs all departures from guideline sentencing for substantial assistance, and its scope includes departures from mandatory minimum sentences permitted by 18 U.S.C. § 3553 (e)"). Petitioner therefore limits his argument before this Court to the statutory provision.[2]

The federal Courts of Appeals have consistently held that § 3553(e) conditions a District Court's authority to depart downward for a defendant's substantial assistance

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[2] Though both § 3553(e) and Policy Statement 5K1.1 are applicable in this case, petitioner initially framed the question presented in terms of § 5K1.1, the broader provision. Cert. Pet. ii. A proposed amendment to § 5K1.1, published after the grant of certiorari in this case, would remove the government motion requirement except in cases also covered by § 3553(e). Notice of Proposed Amendment to § 5K1.1 of the United States Sentencing Comm'n Manual, 57 Fed. Reg. 90-01 (1992) (proposed Jan. 2, 1992). Petitioner has therefore rephrased the question presented to confine inquiry to the interpretation of § 3553(e), which serves as statutory authority for § 5K1.1 but cannot be altered by the proposed amendment. *See* Sup. Ct. Rule 24.1(a) (question presented includes all issues fairly implicit in the question listed in petition for certiorari, and may be rephrased to make these issues explicit). Should Congress reject the proposed amendment to § 5K1.1 and elect to retain the government motion language in that provision, this Court's ruling on the § 3553(e) issue in this case should also control in situations where § 5K1.1 alone applies, because the government motion requirements in the two provisions are identical.

upon a government motion.[3] The Fourth Circuit agreed with this reading of the statute (J.A. 26), and petitioner does not challenge that holding her Petitioner challenges only the Fourth Circuit's second holding: that the prosecutor's refusal to make a § 3553(e) motion in a particular case is utterly beyond judicial review, absent a plea agreement (J.A. 26-29). That holding is inconsistent with a long line of this Court's precedents making clear that even decisions committed to prosecutorial discretion remain subject to the limited judicial review necessary to ensure that the prosecutor is not exercising his discretion in an unconstitutional manner. The Fourth Circuit's holding is not required by the statutory language, undermines the statute's purpose, and raises serious constitutional problems: it should therefore be reversed.

I. DECISIONS COMMITTED TO THE DISCRETION OF THE PROSECUTOR ARE NONETHELESS SUBJECT TO LIMITED JUDICIAL REVIEW.

The American criminal justice system has traditionally committed certain key decisions to the discretion of the prosecutor. Most prominent among these are the decisions whether to prosecute, *see United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); and if so, what charges to press, *see Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (deciding "what charge to file or bring before a grand jury . . . generally rests entirely in [the prosecutor's] discretion").

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[3] *See, e.g., United States v. Kuntz*, 908 F.2d 655, 657 (10th Cir. 1990); *United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990); *United States v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990); *United States v. Huerta*, 878 F.2d 89, 91 (2d Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990); *United States v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989), *cert. denied*, 493 U.S. 1047 (1990).

Like any other power conferred upon the Executive Branch, however, this prosecutorial discretion "'is not unfettered,'" but remains "'subject to constitutional constraints.'" *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quoting *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979)); *see Bordenkircher*, 434 U.S. at 365 ("broad through [prosecutorial] discretion may be, there are undoubtedly constitutional limits upon its exercise"). As this Court has recognized repeatedly, these "constitutional limits" include the guarantees of fair and equal treatment contained in the Due Process Clause of the Fifth Amendment. Although the prosecutor is permitted "the conscious exercise of some selectivity" in his enforcement of the criminal laws, *Oyler v. Boles*, 368 U.S. 448, 456 (1962), equal protection principles forbid him to "deliberately base" those discretionary decisions "upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886)); *see Batchelder*, 442 U.S. at 125 n.9; *Two Guys from Harrison-Allenton, Inc. v. McGinley*, U.S. 582, 588 (1961). Similarly, the Due Process Clause forbids the prosecutor to use his discretion to punish a defendant for "exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (citing *Bordenkircher*, 434 U.S. at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort")); *see also Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (same).

To safeguard these constitutional guarantees, this Court has long held that the federal courts may review even those decisions committed to the sole discretion of the prosecutor for the limited purpose of ensuring that the prosecutor is not exercising his discretion in an unconstitutional manner. *See Wayte*, 470 U.S. at 608-14 (reviewing United States Attorneys' charging decisions for alleged equal protection and first amendment viola-

tions); *Goodwin*, 457 U.S. at 384-85 & n.19. (United States Attorney's charging decision may be reviewed for vindictive motivation that violates due process); *Blackledge*, 417 U.S. at 24-30 (same). A contrary holding would place the prosecutor's actions beyond the reach of the Constitution and reduce the constitutional guarantees of due process and equal protection to empty platitudes.

Like the decisions whether and how to prosecute, the decision to seek a downward departure for substantial assistance is committed by statute to the discretion of the prosecutor. *Compare, e.g.*, 28 U.S.C. § 547 (giving United States Attorney power to "prosecute for all offenses against the United States") *with* 18 U.S.C. § 3553 (e) (giving prosecutor power to initiate consideration of defendant's cooperation at sentencing). As such, it is *generally* beyond judicial interference. But like other matters committed to prosecutorial discretion, it must remain subject to the *limited* judicial review necessary to ensure that the prosecutor is not exercising his discretion in an unconstitutional manner. *See Wayte*, 470 U.S. at 608.[4] The Fourth Circuit's refusal to permit this limited review places the prosecutor's decision on this important aspect of sentencing completely beyond the reach of the Constitution. No other decision in the federal criminal justice system is similarly immune from constitutional scrutiny.

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[4] The government agrees that the discretion granted the prosecutor by § 3553(e) is "akin to . . . [that] enjoyed by the government in determining whether to prosecute, or what charges to bring." Brief of United States in Opposition to Petition ("Cert. Opp.") at 5-6 (citations omitted). Having conceded the analogy, though, the government refuses to accept its logical conclusion: that the decision not to seek a downward departure must be subject to the same sort of limited judicial review as those other prosecutorial decisions. *See id.* at 6 ("[T]he government's decision not to file a 'substantial assistance' motion is not subject to judicial review").

II. A FEDERAL DISTRICT COURT'S INHERENT POWER TO CONTROL THE CONDUCT OF ATTORNEYS IN PROCEEDINGS BEFORE IT GIVES IT POWER TO REVIEW THE PROSECUTOR'S DECISION NOT TO FILE A SUBSTANTIAL ASSISTANCE MOTION.

It is settled law that the federal trial courts have the inherent power to supervise the conduct of proceedings before them. *See, e.g., Chambers v. NASCO, Inc.*, —— U.S. ——, 111 S.Ct. 2123, 2132-33 (1991) (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 264 (1988) (SCALIA, J., concurring) ("every United States court has an inherent supervisory authority over the proceedings conducted before it"). This "supervisory" power is derived not from "rule or statute but [from] the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31; *see Hudson*, 11 U.S. (7 Cranch) at 34 ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution," because "they are necessary to the exercise of all others").

As this Court has often recognized, a federal court's inherent power gives it the right to supervise the conduct of prosecutors in federal criminal proceedings before it. *See, e.g., United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Hale*, 422 U.S. 171, 180 & n.7 (1975); *see also Bank of Nova Scotia*, 487 U.S. at 254; *id.* at 264 (SCALIA, J., concurring) (federal district court's "inherent supervisory authority" extends to monitoring prosecutors' "performance before the court"). The court may use this power to demand that federal prosecutors adhere not only to the standards of conduct actually required by the Constitution, but also to

those the court deems necessary to preserve the integrity of federal criminal proceedings. *See McNabb v. United States*, 318 U.S. 332, 340 (1943) (Frankfurter, J.) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure," which "are not satisfied merely by observance of those minimal historic safeguards . . . summarized as 'due process of law' "); *Hasting*, 461 U.S. at 505 (court may use its supervisory power to remedy violation of a defendant's "recognized rights," to "preserve [the] integrity" of federal criminal proceedings before it, and to "deter illegal conduct" by government agents).[5]

A federal district court's inherent supervisory power gives it the authority to inquire into the reasons why the prosecution refuses to file a substantial assistance motion in a particular case. Such an inquiry is necessary to ensure that the prosecutor's conduct does not actually violate the defendant's constitutional rights: that it is not based on race, religion, sex, exercise of protected constitutional or statutory rights, or other arbitrary and irrational reasons. It is also necessary to preserve the integrity of federal criminal proceedings, which is directly threatened by improper or unconstitutional behavior by prosecutors. As the Second Circuit has explained in an analogous situation, "[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for

[5] *See also United States v. Samaniego*, 607 F.2d 877, 881 (9th Cir. 1979) (federal district court may use its "inherent supervisory powers" to "protect the integrity of the judicial process . . . from unfair or improper prosecutorial conduct"); *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974) (Hufstedler, J., concurring) ("An important function of [the federal courts'] supervisory power is to guarantee that federal prosecutors act with due regard for the integrity of the administration of justice").

determining its applicability." *United States v. Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974). Finally, such review is necessary to deter future illegal or improper conduct by prosecutors, whose decisions should not remain forever shuttered from the watchful eye of the court. *See Hasting*, 461 U.S. at 505.

III. 18 U.S.C. § 3553(e) DOES NOT PRECLUDE LIMITED JUDICIAL REVIEW OF THE PROSECUTOR'S DECISION NOT TO FILE A SUBSTANTIAL ASSISTANCE MOTION.

Contrary to the Fourth Circuit's conclusion, nothing in the Act itself precludes the limited judicial review described above. While § 3553(e) grants a federal district court express authority to depart downward for substantial assistance only upon motion from the government, it says nothing whatsoever about the district court's power to review the government's decision not to file such a motion. The Fourth Circuit apparently inferred that Congress' failure explicitly to provide for such review was intended affirmatively to deny it. Under traditional canons of statutory construction long adhered to by this Court, however, Congress' silence on the issue of judicial review cannot be interpreted to forbid it.

Just last Term, this Court refused to hold that congressional silence on another aspect of guidelines procedure was intended affirmatively to deny defendants procedural protections traditionally accorded them in analogous situations. *Burns v. United States*, —— U.S. ——, ——, 111 S.Ct. 2182, 2186-88 (1991) (Congress' failure expressly to require notice to the parties before an upward departure from guidelines range did not signify an intent to deny them such notice). As the Court explained in *Burns*, congressional intent to "rule out" a particular procedure cannot be inferred from its failure expressly to provide for that procedure, where such an interpretation would be "inconsistent with [the statute's] purpose,"

"completely opposite to the meaning that this Court has attached to silence in a variety of analogous settings," and would require the Court to confront a "serious constitutional problem." *Id.*, at ——, 111 S.Ct. at 2186-87. In such cases, congressional silence should not be interpreted as "rul[ing] out a particular statutory application," but as "signif[ying] merely an expectation that nothing more need be said" on the subject. *Id.* at ——, 111 S.Ct. at 2186. Application of accepted canons of statutory construction leads to a similar conclusion in this case.

First and foremost, reading § 3553(e) to preclude all judicial review of the prosecutor's decision not to file a substantial assistance motion would undermine one of the central purposes of the Act: the elimination of "'unwarranted sentencing disparities among defendants with similar records.'" *Mistretta v. United States*, 488 U.S. 361, 374 (1989) (quoting 28 U.S.C. § 991(b)(1)).[6] As Congress expressly recognized in 28 U.S.C. § 994(n), a defendant's cooperation is an important aspect of his record that should be taken into account in fixing his sentence. If such cooperation can result in a sentence below the statutory mimimum only upon government motion, and the government's decision not to file such a motion is completely beyond judicial review, then defendants who have given substantially equivalent levels of assistance to the authorities and whose records are otherwise equivalent may receive significantly different sentences, depending on the policy and prejudices of the particular prosecutor involved:[7]

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[6] *See also* S. Rep. No. 90-225 (1983), at 49; U.S.S.G. Ch. 1, Pt. A, intro. 3 (one of the Act's main objectives was to ensure "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders").

[7] The standards used to determine whether a defendant's cooperation merits a motion for reduction of sentence vary widely from one United States Attorney's Office to another. *See, e.g., United States v. Donatiu*, 922 F.2d 1331, 1335 (7th Cir. 1991) (defendant must "actually help" in the prosecution of another defendant); *United States v. Chotas*, 913 F.2d 897, 902 (11th Cir. 1990) (Clark, J., concurring in part and dissenting in part) (defendant must "accept responsibility for his participation in the crime"), *cert. denied*, —— U.S. ——, 111 S.Ct. 1421 (1991); *United States v. Curran*, 724 F. Supp. 1239, 1241 (C.D. Ill. 1989) (defendant must participate in covert operations, among other things); *United States v. Coleman*, 707 F. Supp. 1101, 1105-06 (W.D. Mo. 1989) (local United States Attorney has a flat "policy" of not filing any substantial assistance motions), *rev'd on other grounds*, 895 F.2d 501 (8th Cir. 1990).

(1) Some will have their cooperation rewarded by sentences below the statutory minimum, including the possibility of probation;

(2) others will receive sentences between the statutory minimum and the bottom of the guideline range; and

(3) still others will receive sentences within the guideline range only.

The courts will remain powerless to correct such arbitrary differences in sentences, and the congressional goal of eliminating sentence disparity will be frustrated.[8]

Moreover, reading § 3553(e)'s language to preclude even limited judicial review of the prosecutor's decision not to seek a downward departure would be "completely opposite to the meaning that this Court has attached to silence in a variety of analogous settings." *Burns*, —— U.S. at ——, 111 S.Ct. at 2187. Statutes giving prosecutors sole discretion to initiate prosecutions and select charges typically contain no language expressly authorizing judicial review of those discretionary decisions. *See*,

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[8] *See Keene*, 933 F.2d at 715 (absence of judicial review of prosecutor's decision "could well frustrate Congress' goal of eliminating sentence disparity"); *Chotas*, 913 F.2d at 905 (Clark, J., concurring in part and dissenting in part) (making prosecutor's decision unreviewable would be "grossly inconsistent with the [statutory] goal of reducing sentencing disparity").

e.g., 28 U.S.C. § 547 (powers of United States Attorneys). But this Court has never construed such legislative silence as precluding the limited judicial review required to ensure that the prosecutor does not exercise his statutory discretion in an unconstitutional manner. *See, e.g., Wayte*, 470 U.S. at 608-14; *Goodwin*, 457 U.S. at 384-85 & n.19.

Finally, reading § 3553(e) as the government suggests would violate the venerable rule that a federal statute "must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *see International Assoc. of Machinists v. Street*, 367 U.S. 740, 749 (1961) ("[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality").[9] This canon of statutory construction "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, —— U.S. ——, ——, 111 S.Ct. 1759, 1771 (1991) (citing *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-07 (1924)). It requires that "every reasonable construction . . . be resorted to in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Where, as here, "the language of the statute is decidedly ambiguous," this Court's "duty to avoid passing unnecessarily upon important constitutional questions is strongest," for it is "both logical and eminently prudent to assume that when Congress intends to press the limits of constitutionality in its enactments, it will express that intent in explicit and unambiguous terms." *Rust*, —— U.S. at ——, 111 S.Ct. at 1779-80 (BLACKMUN, J., dissenting); *see also DeBartolo Corp.*, 485 U.S. at 575 ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

[9] Construing § 3553(e) as the government suggests would also violate the settled maxim that ambiguities in criminal statutes must be resolved in favor of the accused. *See United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971). As this Court has often explained, this "rule of lenity" applies to ambiguities in sentencing provisions as well as substantive ones. *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Batchelder*, 442 U.S. at 121; *Simpson v. United States*, 435 U.S. 6, 14-15 (1978). That § 3553(e) is at least ambiguous on the question of judicial review cannot seriously be doubted, as the conflict in the Courts of Appeals which prompted the grant of certiorari in this case vividly demonstrates. *See infra* n.13; *see also Rust v. Sullivan*, —— U.S. ——, 111 S. Ct. 1759, 1767 (1991) (statutory language is "ambiguous" on a particular issue when it "does not speak directly to" that issue). Accordingly, the rule of lenity requires a construction that does not preclude judicial correction of the government's improper refusal to file a substantial assistance motion in a particular case.

This principle is fully applicable here. As several courts have recognized,[10] construing the government motion requirement to forbid all judicial review of the prosecutor's decision not to file a substantial assistance motion would

[10] *See, e.g., United States v. Doe*, 934 F.2d 353, 362-63 (D.C. Cir.) (D.H. Ginsburg, J., concurring) (5K1.1) (characterizing this constitutional question as one whose resolution is "far from clear," "difficult[]," and worthy of this Court's attention), *cert. denied*, —— U.S. ——, 112 S.Ct. 268 (1991); *United States v. Justice*, 877 F.2d 664, 667-69 (8th Cir.) (5K1.1), *cert. denied*, 493 U.S. 958 (1989); *United States v. Gutierrez*, 908 F.2d 349, 352, 354-55 (8th Cir.) (Heaney, J., dissenting) (5K1.1), *vacated*, 917 F.2d 379 (8th Cir. 1990) (en banc) (mem.) (affirming by an equally divided vote, without opinion, the decision of the District Court); *United States v. Roberts*, 726 F. Supp. 1359, 1374-75 (D.D.C. 1989) (3553(e) and 5K1.1) ("It is difficult to conceive of a parallel situation in the law where substantial liberty interests and consequences provided for by statute are beyond the power of inquiry by anyone."), *rev'd on other grounds sub nom. United States v. Doe, supra; Curran*, 724 F. Supp. at 1241-45 (3553(e) and 5K1.1).

raise a serious constitutional problem: whether the Due Process Clause of the Fifth Amendment permits Congress to commit a decision with such a significant impact on a defendant's sentence to the utterly unreviewable authority of his adversary, the prosecutor. This constitutional problem is analytically distinct from the more general due process challenge typically mounted to the government motion requirement itself. That challenge, uniformly rejected by the Courts of Appeals is that the government motion requirement improperly limits the situations in which the sentencing court can consider the defendant's cooperation.[11]

Petitioner does not raise a general due process challenge to the government motion requirement here. Instead, he contends only that even if the government motion requirement itself is not constitutionally offensive, interpreting that requirement *to forbid all judicial review of the prosecutor's decision* not to file a substantial assistance motion would render the statute unconstitutional under the procedural component of the Due Process

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[11] The traditional due process challenge to the government motion requirement of § 3553(e) and Policy Statement 5K1.1 has been a substantive rather than procedural one: that it improperly limits the situations in which a sentencing court may consider cooperation with the authorities, in derogation of the defendant's right to present mitigating evidence at sentencing and to obtain an individualized, judicially-crafted sentence. *See, e.g., United States v. La Guardia*, 902 F.2d 1010, 1015-17 (1st Cir. 1990); *Doe*, 934 F.2d at 356-58. The Courts of Appeals have uniformly rejected this argument, in all of its various guises, reasoning essentially as follows: Congress has the constitutional power to eliminate all sentencing discretion and establish mandatory sentences for all non-capital crimes. It therefore has the power to take the lesser step of limiting the factors a court may consider in fixing sentences for those crimes, *e.g.*, by forbidding consideration of a defendant's cooperation. Because defendants therefore have no constitutional right to have their cooperation considered at all, they cannot complain that the government motion requirement improperly limits the situations in which the court can consider it. *See, e.g., id.* (colleting cases).

Clause.[12] *Compare* Brief of National Association of Criminal Defense Lawyers As Amicus Curiae Supporting Petitioner (filed Jan. 23, 1992) (raising procedural due process challenges to both the government motion requirement and a construction of the statute that precludes all judicial review of the prosecutor's decision).

The gravity of this constitutional problem is readily apparent.[13] It has long been "clear that the sentencing

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[12] The government attempts to blur the distinction between the two types of challenges, citing various decisions rejecting substantive due process challenges to the government motion requirements of § 3553(e) and Policy Statement 5K1.1 as support for the entirely separate proposition that "the government's decision not to file a 'substantial assistance' motion is not subject to judicial review." Cert. Opp. at 6 & n.4.

[13] Indeed, the problem is so obvious that ten of the twelve Courts of Appeals have refused to accept the government's position that § 3553(e) and Policy Statement 5K1.1 totally preclude all judicial review of the prosecutor's refusal to file a substantial motion (absent a controlling provision in a plea agreement).

One Circuit allows a review that appears to be completely open-ended. *See United States v. Paden*, 908 F.2d 1229, 1234 (5th Cir. 1990) (5K1.1) ("The absence of a government motion . . . 'does not preclude the district court from entertaining a defendant's showing that the government is refusing to recognize [his] substantial assistance.'"). Five Circuits allow a limited review for "bad faith or arbitrariness" sufficient to constitute a substantive due process violation. *See United States v. Agu*, 949 F.2d 63 (2d Cir. 1991) (5K1.1); *United States v. Hubers*, 938 F.2d 827, 829 (8th Cir.) (5K1.1), *cert. denied*, —— U.S. ——, 112 S.Ct. 427 (1991); *United States v. Mena*, 925 F.2d 354, 455-56 (9th Cir. 1991) (5K1.1); *United States v. Vargas*, 925 F.2d 1260, 1267 (10th Cir. 1991) (5K1.1); *United States v. Villarino*, 930 F.2d 1527, 1530 (11th Cir. 1991) (5K1.1). Two Circuits permit a similarly limited review "under the same standards currently employed by district courts to review other matters committed to prosecutorial discretion": to ensure that the prosecutor's decision is not based "upon an unjustifiable standard such as race, religion, or other arbitrary classification" or intended "to penalize a defendant for exercising his legally protected rights." *United States v. Doe*, 934 F.2d 353,

process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Although a defendant has no right to a particular sentence, he "has a legitimate interest in the character of the procedure which leads to the imposition of sentence." *Id.* 18 U.S.C. § 3553(e) makes the potential range of a defendant's sentence turn on the resolution of a single dispositive issue: whether he has provided "substantial assistance" to the authorities. Giving the prosecutor unreviewable authority to resolve this issue would violate a cardinal tenet of due process: that a criminal defendant has the right to have a neutral and unbiased decisionmaker finally resolve all questions that may result in a significant restraint on his liberty.

As this Court explained, "[w]hen the stakes are this high, the detached judgment of a neutral [decisionmaker] is essential . . . to furnish meaningful protection from unfounded interference with liberty." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Applying this rule, this Court has consistently held prosecutors and other executive officers are not sufficiently "neutral" to make final determinations on issues that may have a significant impact on a defendant's liberty. *See, e.g., Gerstein*, 420 U.S. at 114 (determination whether there is probable

361 (D.C. Cir.) (5K1.1), *cert. denied*, —— U.S. ——, 112 S.Ct. 268 (1991); *United States v. Bayles*, 923 F.2d 70, 72 (7th Cir. 1991) (5K1.1) (same). Another Circuit has suggested in dicta that it would follow *Doe* and *Bayles*. *United States v. Romolo*, 937 F.2d 20, 24 n.4 (1st Cir. 1991) (5K1.1). Still another has expressly reserved the question "whether a prosecutor's arbitrary or bad faith refusal" to file a 3553(e) motion may be reviewable as a due process violation. *United States v. Gardner*, 931 F.2d 1097, 1099 n.4 (6th Cir. 1991). Only one Circuit, the Third, appears to agree with the Fourth Circuit's conclusion that a district court has no power whatsoever to review a prosecutor's refusal to file a substantial assistance motion absent an applicable provision in a plea agreement. *See United States v. Gonzales*, 927 F.2d 139, 145-46 n.5 (3d Cir. 1991) (5K1.1).

cause to hold defendant for trial must be made by judge, not by prosecutor); *Shadwick v. City of Tampa*, 407 U.S. 345, 348-51 (1972) (determination whether there is probable cause for issuance of arrest warrant must be made by "neutral and detached judicial officer"); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (preliminary determination whether conditions of parole have been violated must be made by "independent decisionmaker" who is "not directly involved in the case," rather than by supervising parole officer).

The same result obtains here. The decision whether to consider substantial assistance as a basis for reduction in sentence can have a significant effect on a defendant's liberty. The Due Process Clause therefore requires that this decision be finally determined by a neutral and detached decisionmaker. Just as the prosecutor in *Gerstein* could not be called "neutral and detached" on probable cause issues, so the prosecutor here cannot be considered "independent" and "impartial" on sentencing issues. Accordingly, the Due Process Clause will not permit Congress to vest him with ultimately unreviewable authority to make the "substantial assistance" determination.[14]

Though this constitutional problem is substantial, this Court need not and should not resolve it to decide this case. Instead, the Court should follow its "time-honored practice" of construing statutes to avoid "reaching constitutional questions unnecessarily," *Rust*, —— U.S. at ——, 111 S.Ct. at 1788 (O'CONNOR, J., dissenting), and

[14] Although the Constitution does not prevent Congress from making a defendant's cooperation totally irrelevant to his sentence, once Congress decides cooperation *is* to be a factor, it may not set up procedures for the consideration of that cooperation that contravene the procedural requirements of the Due Process Clause. *See Doe*, 934 F.2d at 362 (D. Ginsburg, J., concurring). To hold otherwise would be to accept the "bitter with the sweet" argument specifically rejected by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540-41 (1985).

hold that Congress did not intend the government motion requirement to forbid the sort of limited judicial review described above. *See Green v Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (SCALIA, J., concurring in judgment) (when "confronted . . . with a statute which, if interpreted literally," produces a result that is "perhaps unconstitutional," the Court should attempt, where fairly possible, "to give [it] some alternative meaning . . . that avoids this consequence"). Such a construction of § 3553(e) "is not only 'fairly possible,' but entirely reasonable," *Machinists*, 367 U.S. at 750, and proper "respect for Congress," *Rust*, —— U.S. at ——, 111 S. Ct. at 1771, requires that this Court adopt it.

IV. ALLOWING THE LIMITED REVIEW SOUGHT HERE WILL NEITHER UNDULY INTRUDE UPON PROSECUTORIAL DISCRETION NOR IMPOSE AN INTOLERABLE ADMINISTRATIVE BURDEN ON THE FEDERAL COURTS.

The review petitioner seeks is extremely limited. He does not ask this Court to hold that a federal district court may routinely substitute its own judgment for that of the prosecutor on the issue whether the assistance given by a defendant was "substantial." That assessment is one which the prosecutor, as the beneficiary of the assistance given, is uniquely competent to make, and his resolution of it should not be subject to general judicial second-guessing. Petitioner asks this Court only to hold that a federal district court has authority to conduct the limited review necessary to protect the integrity of federal criminal proceedings by ensuring that the prosecutors does not exercise his discretion in an unconstitutional manner: that is, to ensure that his refusal to make a substantial assistance motion is not

(1) "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," in violation of the constitutional guarantee of equal protection, *see Bordenkircher*, 434 U.S. at 364; *Bolling v. Sharpe*, 347 U.S. 497 (1954) (equal protection principles apply to federal government through Fifth Amendment's Due Process Clause);

(2) "motivated by a desire to punish" the defendant "for exercising a protected statutory or constitutional right," in violation of his due process rights, *see Goodwin*, 457 U.S. at 372, 384; or

(3) the result of "bad faith" or "arbitrariness" sufficient to constitute a substantive due process violation, *see United States v. Samango*, 607 F. 2d 877, 881 (9th Cir. 1979) (court may interfere with discretionary decision of prosecutor when it is so "arbitrary and capricious" as to be "violative of due process").

Review of the actual assistance given would be appropriate only to the extent necessary to determine whether its asserted lack of substantiality is merely a "pretext" for some unconstitutional motive that is the "real reason" for the prosecutor's actions.[15]

This limited review will not constitute, as the Fourth Circuit feared, an "undue intrusion by the courts into the . . . discretion granted by the statute to the [prosecutor]" (J.A. 28). As noted above, this Court has long allowed district courts to undertake a similarly limited review of the prosecutor's decisions whether and how to charge, notwithstanding potential separation of powers concerns. The review sought here is much less intrusive: far from inquiring into decisions made by the Executive Branch acting solely within its own domain, the court is

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[15] Of course, review pursuant to *Santobello v. New York*, 404 U.S. 257 (1971), should also be permitted whenever the prosecutor's refusal to make the motion is alleged to violate the terms of a plea agreement. The Courts of Appeals are not in disagreement on this point. *See United States v. Conner*, 930 F.2d 1073, 1075 (4th Cir. 1991) (collecting cases), *cert. denied*, —— U.S. ——, 112 S.Ct. 420 (1991).

examining the propriety of the prosecutor's conduct in an ongoing judicial proceeding. While the separation of powers concerns that constrain judicial review of prosetorial decisions are at their apex prior to indictment, they diminish significantly as the judicial process is invoked and the court's interest in preserving the integrity of its own proceedings is implicated. *Cf. United States v. Torquato*, 602 F.2d 564, 569 & n.10 (3d Cir. 1979).

Nor will the review sought here impose undue administrative burdens upon the federal court system. The lower federal courts have developed a number of procedural mechanisms for allowing defendants to raise the limited challenges to charging decisions already permitted by this Court without undue interference with the prosecutorial function or undue imposition upon the court's time. These include a strong presumption that prosecutorial action is taken in good faith [16] and a requirement that the defendant make a substantial threshold showing in order to obtain discovery or an evidentiary hearing on allegations of prosecutorial misconduct.[17] Taken together, these mechanisms have proved adequate to prevent specious and unsupportable claims of prosecutorial "bad faith" in charging decisions, which can be raised by virtually any defendant, from unduly burdening courts and prosecutors.[18] They should be more than adequate to eliminate similarly specious challenges to § 3553(e) decisions, which can legitimately be raised only by defendants who have cooperated with the authorities.[19]

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[16] *See Torquato*, 602 F.2d at 569.

[17] *See e.g., United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (claim of discriminatory prosecution); *United States v. Jacob*, 781 F.2d 643 (8th Cir. 1986) (same); *United States v. Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. 1982) (Kennedy, J.) (claim of vindictive prosecution).

[18] *See generally* 2 W. LaFave & J. Israel, *Criminal Procedure*, §§ 13.4 & 13.5 (1984).

[19] This Court need not decide now what remedy a district court should impose if, after a proper inquiry, it finds that a prosecutor has refused to file a § 3553(e) motion for an unconstitutional reason. Because the District Court in this case refused to entertain any inquiry whatsoever into the reasons for the prosecutor's failure to file the motion, there is neither a finding below nor a factual record on that issue. As a result, there is no way for this Court to determine whether the prosecutor's action requires any remedy. The question of the appropriate remedy will arise in this case only if, on remand, the District Court determines that the prosecutor's reasons for refusing to file the motion were in fact improper.

A prosecutor's decision to file a substantial assistance motion can have a significant effect on the defendant's sentence: it can mean the difference between probation and a substantial term of imprisonment. Although the prosecutor has broad discretion in making this decision, the Constitution does not permit him to exercise that discretion in an arbitrary or discriminatory manner. To protect the constitutional rights of defendants and preserve the integrity of federal criminal proceedings, the prosecutor's substantial assistance decision must remain subject to the limited judicial review currently applicable to other decisions committed to prosecutorial discretion. Properly interpreted, § 3553(e) does not preclude such limited judicial review. The Fourth Circuit erred in concluding to the contrary, and its decision should be reversed.[20]

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[20] The government cannot avoid petitioner's right to judicial review by pointing to the absence of any evidence in the record that the prosecutor's motives were improper. *Cf.* Cert. Opp. at 7 (asserting that the reviewability question "is not presented here" because petitioner "has made no showing that the assistance he provided was sufficiently substantial"). The absence of such evidence in the record is not due to petitioner's inability to produce it, but to the District Court's refusal to entertain any allegations of prosecutorial misconduct, much less any evidence to support such allegations. *See* J.A. 10.

Nor can the government avoid petitioner's right to judicial review by pointing to petitioner's alleged obstruction of justice. *See* Cert. Opp. at 7 (asserting that "petitioner cannot reasonably complain that the government acted in bad faith in refusing to file a 'sub-

CONCLUSION

For the reasons given above, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed, and the case remanded to the United States District Court for the Middle District of North Carolina for further consideration of the reasons for prosecutor's refusal to move for a downward departure.

Respectfully submitted,

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stantial assistance' motion," because "the presentence report concluded that [he] obstructed justice"). Because the District Court refused to entertain any inquiry whatsoever into the reasons for the prosecutor's failure to make the motion, petitioner was not allowed to explore the relationship—if any—between that failure and the alleged obstruction of justice. Thus, far from supporting affirmance of the decision below, these alleged "failures of proof" serve only to illustrate the critical need for some inquiry into the reasons why the prosecutor refused to file a section 3553(e) motion.